No. 97100318

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In The

Supreme Court of the United States

October Term, 1996

MARY AMANDA WEST, A Minor Child, by and through her Parent and Next Friend, Rita Norris,
Petitioner,

v.

JAMES BRADLEY WAYMIRE, individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPONDENTS' CITY OF FRANKTON, AND THE FRANKTON POLICE DEPARTMENT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents, the City of Frankton and the Frankton Police Department (collectively referred to as "the Town"), disagree with the statement of the questions presented for review in Mary Amanda West's ("West") Petition for Certiorari. Instead, the questions presented for review are these:

1. Whether municipal liability may be imposed against the Town under 42 U.S.C. §1983 for the sexual molestation of a minor by one of its police officers, where the Town had no knowledge of any prior acts of sexual misconduct other than passing inappropriate remarks made to an adult.

2. Whether the Town may be held liable under §1983 for allegedly failing to train and supervise James Brad Waymire ("Brad Waymire") where the Town lacked any knowledge of a pattern of constitutional violations or prior knowledge of a widespread practice of sexual molestation of minors by its officers.

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STATEMENT OF THE CASE

The Town also disagrees with the statement of the case submitted by West for several reasons. First, West fails to advise this Court that she continues to pursue various negligence theories of liability against the Town in an Indiana state court. Under normal circumstances, reference to this omission from the statement of facts might appear petty. However, in light of West's repeated assertions in her Petition that the Seventh Circuit's decision leaves her with a wrong without a remedy, it is important for the Court to realize that West is not without remedy. Lost in West's righteous indignation is the fact that she is not without a remedy. As the Seventh Circuit correctly observed, West's federal Complaint contains supplemental state law claims and "West has since refiled it in an Indiana state court." West by and Through Norris v. Waymire, 114 F.3d 646, 647 (7th Cir. 1997).

The Petition Misrepresents The Underlying Facts

In an effort to persuade this Court to grant certiorari, West grossly misrepresents and distorts the underlying facts. West would have this Court believe that sexual misconduct by police officers was rampant in Frankton. A reading of West's Petition leaves the reader with the impression that the Frankton Town Board had long-standing knowledge about Brad Waymire's alleged sexual misconduct yet sat on its hands and took no action to remedy the situation, with the inaction culminating in Brad Waymire's sexual molestation of West. This is simply not true.

West asserts in her Petition that "the material facts are accurately recited in the Seventh Circuit's opinion." (Petition for Certiorari at p. 4). However, the purported facts as set forth in West's Petition do not accurately reflect the facts as found by the Seventh Circuit Court of Appeals. The following

illustrations are the most glaring of West's misrepresentation of the underlying facts.

West places undue emphasis upon two incidents involving Leslie Huffman, a woman who later married the Town's other full-time police officer, David Wayne Huffman. The undisputed testimony is that neither Chief Pulley nor any member of the Town Board had any knowledge about these incidents until after West's allegations about Brad Waymire surfaced. As the Seventh Circuit accurately commented, "[t]here is no direct evidence that either incident involving Mrs. Huffman was known to Chief Pulley or the Town's Board of Supervisors." 114 F.3d at 648. Thus, West cannot rely upon either of the Huffman incidents as placing the Town on notice that Brad Waymire engaged in sexual misconduct during the course and scope of his employment. These incidents did not come to light until Ernie Crowder's investigation in September, 1993, after West's allegations surfaced.

West also misrepresents certain comments made by Brad Waymire during the March 17, 1993 Executive Session of the Town Board. During that meeting, Brad Waymire made a comment about rumors that he was "messing around with 13 year old girls." Throughout her Petition, West relies on Brad Waymire's statement as evidence that the Town had actual notice of his sexual misconduct. In fact, West goes so far as to suggest that the rumors about Brad Waymire "messing around with 13 year old girls" was the reason for the executive meeting of the Town Board on March 17, 1993. This is untrue and grossly distorts the true facts.

Sometime after Chief Pulley and the Town Board President, Myron Waymire, interviewed Burger, Chief Pulley informed Brad Waymire that there were rumors about him involving Burger. Chief Pulley also informed Brad Waymire that, as Frankton was a small town, he should probably inform his wife about the rumors concerning Burger.

On March 15, 1993, Brad Waymire sent a memorandum to the Town Board requesting a special hearing, in executive session, concerning the allegations that were being made against him. The memorandum reads as follows:

> According to the grievance procedure outlined in the Employee Manual I am requesting a hearing before an executive session of the Board. I would appreciate this meeting as soon as possible. Certain allegations have been made against me and I feel time is very important. My standing in the community, privately as well as professionally, as well as my family's reputation are at stake. I think you will agree that in a small community such as ours bad news spreads quickly. I also feel that if this matter is not quickly resolved my employment with the Town of Frankton and future employment anywhere else will be adversely affected.

During the early stages of the Executive Session meeting, Brad Waymire alluded to the remarks he previously made about Burger's 13 year old daughter:

> I admitted to flirting with her, but the fact is I never flirted with her anymore than what she flirted with me. She, I believe, told you that she shocked — (unintelligible). The fact is, I asked her if I ever said anything against her, and she said, "No." I did tell her that her daughter was very pretty (unintelligible) 13 years old. Now her daughter dates an 18 year old boy, so I assume she doesn't mind anything about (unintelligible) statutory rape. She certainly (unintelligible) that. I never made any

> suggestion about her or her daughter, I never touched her, I never pursued her — and she was divorced for a time — I never pursued her, I didn't bother her, I didn't send her at any time other (unintelligible).

While West would like to attribute Brad Waymire's comment about "messing around with 13 year old girls" as the sole reason for convening the executive meeting, this is simply not true. Also, Brad Waymire's comment was certainly not an admission on his part that he was engaging in sexual relationships with West, or any other 13 year old girls. Rather, as the Seventh Circuit correctly observed, Brad Waymire's comment about "messing around with 13 year old girls" was apparently a reference to his prior remarks about Burger's 13 year old daughter looking good in a pair of jeans. 114 F.3d at 648.

West also refers to an incident where Brad Waymire purportedly exposed himself to one of Burger's co-workers as further evidence of actual knowledge of sexual misconduct. However, West conveniently neglects to inform the Court that the Town Board had no knowledge about that incident. As the Seventh Circuit correctly observed:

> The record contains evidence of other sexual misconduct by Waymire, including exposing himself to a co-worker of Burgers, although there is no evidence that the police chief or the Town Board knew about any of this other misconduct. Apart from the remarks about Burger's daughter and, of course, his conduct with Amanda, none of Waymire's sexual conduct or innuendos involved so far as anyone knows, minors. 114 F.3d at 649. (Emphasis added).

Despite West's blatant distortion of the underlying record, the fact remains that the only incident of which the Town Board had actual knowledge is the incident in which Brad Waymire made inappropriate comments to Burger. There is no evidence that the Town Board had notice of prior acts of sexual molestation of minors by either Brad Waymire or any other members of the Frankton Police Department. Similarly, there is no evidence that the Town Board knew that Brad Waymire was molesting West. 114 F.3d at 652. In addition, it is undisputed that the only incident of which the Town Board had actual knowledge, the Burger incident, involved only an allegation of inappropriate comments; not an allegation of sexual molestation.

This Court should not be taken in by West's unbridled attempt to change the factual landscape of this case. The issue presented by West's Petition is whether a municipality may be held liable under §1983 where the uncontroverted evidence is that the Town Board had knowledge only of Brad Waymire's inappropriate comments to Burger. As the Seventh Circuit correctly observed, Brad Waymire's comments to Burger are "not the equivalent of a threat to commit criminal acts upon that or any other 13 year old." 114 F.3d at 652. Under the stringent standards for municipal liability articulated by this Court in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), City of Canton v. Harris, 489 U.S. 378 (1989) and Board of Commissioners v. Brown, ___ U.S. ___, 117 S.Ct. 1382 (1997), the Seventh Circuit correctly held that the Town could not be held liable under §1983. None of the arguments advanced in West's Petition present a valid reason to disturb the Seventh Circuit's opinion.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

No Compelling Reason Exists To Review This Case

Rule 10 of the Rules of the Supreme Court cautions that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Moreover, a petition for certiorari may be granted "only for compelling reasons," such as the existence of a conflict among the circuits. Rule 10(a).

The present case is not a case in which this Court should exercise its discretion. West's Petition contains no suggestion as to the existence of confusion or conflict in the lower courts about the law of municipal liability under §1983 or how that well-settled law is to be applied. Also, as will be set forth in the next section, the Seventh Circuit correctly applied the law as articulated by this Court in Monell, Canton and Brown.

Implicit in West's Petition is an invitation to carve out exceptions to Monell and its progeny and impose liability upon a municipality whenever a wrongdoer, like Brad Waymire, lacks the financial means to satisfy a monetary judgment. West obtained a default judgment against Brad Waymire in his individual capacity and the District Court entered a $600,000.00 judgment against him. Brad Waymire is currently serving an eight-year prison sentence, having pled guilty to five counts of child molestation.

West has not been deprived of her federal remedies under §1983. She has a substantial judgment against Brad Waymire. That Brad Waymire may be unable to satisfy that judgment is not a reason to shift the blame for his conduct to the Town.

The underlying purpose of §1983 is to provide a remedy for the wrongful conduct of a government official whose conduct "causes" the deprivation of another individual's constitutional rights. Congress did not enact §1983 to provide a deep pocket for the recovery of monetary damages.

Section 1983 is a fault-based statute. Indeed, in Monell, this Court held that a municipality may be held liable under §1983 only where the municipality itself causes the constitutional violation at issue. 436 U.S. at 694-95. This conclusion is consistent with the plain language of §1983 which provides for the imposition of liability only upon one who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights. In Monell, this Court emphasized that §1983 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." Id. at 692. Consistently, this Court has refused to hold municipalities liable under a theory of respondeat superior. See e.g., Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (plurality opinion); Pembaur v. Cincinnati, 475 U.S. 469 (1986); St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality opinion).

Moreover, nowhere in her Petition does West offer any sound public policy reasons for either overruling Monell or creating some exception to the limited circumstances under which a municipality may be held liable under §1983. The possibility that West may not be compensated by the wrongdoer, Brad Waymire, is not a sufficient reason for this Court to exercise its judicial discretion.

The Seventh Circuit Correctly Applied The Well Settled Governing Standards For Municipal Liability

West's entire Petition is founded upon her misguided belief that the "plainly obvious" standard for municipal liability discussed by this Court in Brown signals a further restriction upon the limited circumstances when municipal liability may be imposed under §1983. West goes so far as to suggest that the "plainly obvious" standard effectively overrules and undermines

the standards articulated by this Court in Monell and Canton. (Petition for Certiorari at pp. ii, 9, 15, 18, 25).

Contrary to West's argument, Brown is not a departure from the standards set out in Monell and Canton. Indeed, Brown simply reinforces the strict standards for municipal liability previously elucidated by this Court in Monell and Canton. As Brown does not alter the law of municipal liability under §1983, the Seventh Circuit correctly applied the settled law as established by this Court and West's call for clarification of this well-settled law should be rejected.

In Monell, supra, this Court held that in certain limited circumstances, a municipality may be held liable under §1983. This Court expressly rejected all notions of respondeat superior or vicarious liability under §1983. Rather, it is only when a municipal policy or custom causes the alleged constitutional violation that a municipality may be held liable under §1983. As this Court stated in Monell, supra:

> [T]he language of §1983 read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to an official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under §1983 on a respondeat superior theory.
>
> * * * *
>
> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents.

> Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. 436 U.S. at 691-94.

In Canton, this Court clarified the limited circumstances in which a municipality may be held liable under §1983, in a failure to train context. This Court imposed a stringent standard: a municipality may be held liable for the failure to train, only where the failure to train amounts to a "deliberate" or "conscious" choice by the municipality. Canton, supra, 489 U.S. at 388-89. This Court observed that the stringent deliberate indifference standard is "most consistent with [the] admonition in Monell...that a municipality can be liable under §1983 only where its policies are the 'moving force [behind] the constitutional violation.'" Id. As Justice O'Connor cautioned in her concurring opinion, liability under §1983 for a local government's sins of omission should not be imposed absent some showing of "a high degree of fault on the part of city officials." 489 U.S. at 396.

Under Canton, there are two avenues for asserting a failure to train claim. One avenue is to show a pattern of constitutional violations sufficient to place the entity on notice that its employees' responses to a regularly occurring situation are insufficient to protect the constitutional rights of citizens. Id., 489 U.S. at 397. This avenue is unavailable to West as there is no evidence of previous similar incidents of sexual molestation of minors by City police officers.

Second, absent a pattern of constitutional violations, municipal liability may be imposed under §1983 for failure to train only where "the need for more or different training is so obvious, and the inadequacies so likely to result in violations of constitutional rights, that the policymakers of the City can

reasonably said to have been deliberately indifferent to the need." Canton, 489 U.S. at 390. For example, in Canton, this Court observed that training as to the use of force is an area where the need for training is so "obvious," that the failure to train amounts to deliberate indifference:

> For example, City policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The City has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force...can said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. 489 U.S. at 390 n.10.

As applied to the present case, the mere possibility that an officer might possibly molest individuals with whom he might came into contact is simply not an area where the need for training is "so obvious" that the failure to train amounts to deliberate indifference. Even the most highly trained officer could sexually molest a minor. The fact that officers encounter teenage girls in their line of duty does not increase the likelihood that one of those officers might molest a teenage girl. As no causal connection exists between any alleged deficiencies in Brad Waymire's training and West's ultimate injury, it would be inappropriate to impose liability upon the Town for Brad Waymire's conduct.

Brown is this Court's most recent pronouncement concerning the limited circumstances under which municipal liability may be imposed under §1983. While West repeatedly attempts to label Brown as signaling a "shift in Section 1983 jurisprudence," nothing could be further from the truth. Brown

simply reinforces the stringent standards previously established by this Court in both Canton and Monell.

Brown involved a claim of deliberate indifference in the hiring of a police officer. The evidence revealed that Deputy Burns had a record of driving infractions and had pled guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness. Sheriff Moore, the Bryan County Sheriff, testified that he failed to adequately review Deputy Burns' background prior to hiring him. Deputy Burns allegedly used excessive force during Brown's arrest after a high speed pursuit. Brown filed suit against Sheriff Moore under §1983, asserting that municipal liability should be imposed based upon Sheriff Moore's failure to screen Deputy Brown's background prior to hiring him. The issue presented by Bryan County's Petition for Certiorari was whether it could be held liable under §1983 for a single hiring decision. This Court revisited its prior decision in Monell and Canton and held that "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." 117 S.Ct. at 1382.

Relying upon the Canton, this Court held in Brown that the failure to scrutinize an individual's background may result in municipal liability only if the consequences of inadequate screening are so "plainly obvious" that they would result in a violation of an individual's constitutional rights. As the following passages from Brown demonstrate, the "plainly obvious" standard is simply a reaffirmation of the stringent standard articulated in Canton:

> As our decision in Canton makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular

glaring omission in a training regime, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.

We assume that a jury could properly find in this case that Sheriff Moore's assessment of Burns' background was inadequate. Sheriff Moore's own testimony indicated that he did not inquire into the underlying conduct or the disposition of any of the misdemeanor charges reflected on Burns' record before hiring him. But this showing of an instance of inadequate screening is not enough to establish "deliberate indifference." In layman's terms, inadequate screening of an applicant's record may reflect

> "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under §1983, however, this is not the relevant "indifference." A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal expected right can the official's failure to adequate scrutinize the applicant's background constitute "deliberate indifference." 117 S.Ct. at 1391-92.

West suggests that certiorari should be granted in this case because the Seventh Circuit purportedly expressed doubt as to whether criminal recklessness or civil recklessness satisfies the deliberate indifference standard. However, the Seventh Circuit was not confused as to the stringent standards applicable to this case. The Seventh Circuit merely observed that this Court's decision in Brown "suggests that the tort standard of recklessness is enough...as long as it isn't allowed to slide into gross negligence." 114 F.3d at 651. However, as the Seventh Circuit quickly observed, the standard for deliberate indifference remains "conscious disregard of known or obvious dangers." Id.

Without question, the deliberate indifference standard is an elusive standard with which numerous federal courts have struggled since the pronouncement of that standard in Canton. The Seventh Circuit's observations in the present case simply reflect the elusiveness of the deliberate indifference standard. However, as the Seventh Circuit observed, under either a

criminal recklessness standard or under a civil recklessness standard, "the defendant must make a deliberate choice; an inadvertent omission won't do." 114 F.3d at 651.

As the Seventh Circuit correctly observed, West loses, regardless of whether a criminal recklessness standard or a civil recklessness standard applies to this case, as the evidence fails to demonstrate an obvious risk that Brad Waymire would molest her:

> But Brown suggests as we have seen that a deliberate choice to avoid an obvious danger (or "plainly obvious," as the Court put it, no doubt for emphasis, 117 S.Ct. at 1392) is actionable under [§1983] if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger. Granted, there may be less here than meets the eye. The difference between "plainly obvious" and an actually known danger — the critical difference between the criminal and tort standards of recklessness — may have little significance in practice, given the difficulty of peering into minds, especially when the "person" whose mind would have to be plumbed is an institution rather than an individual.
>
> The Town of Frankton...did not intend Waymire to molest Amanda. Nor is there any evidence that the Town knew Waymire was molesting Amanda. Or even that it knew there was a serious risk of this. But all of this is just to say that there is no proof that the Town was criminally reckless in failing to protect her. We should also consider whether the risk to her was nevertheless obvious, which would be enough to cast liability onto the Town under the tort

standard of recklessness, which may be the standard after Brown and Canton.

> Slackness, laxness, cronyism, confusion, and dumbness there were in profusion; what is lacking is an obvious risk that Waymire was a child molester. All that was obvious was that he had commented to Burger about her 13 year old daughter's being sexy. Such a comment — in context a piece of sexual badinage with the mother — is not the equivalent of a threat to commit criminal acts upon that or any other 13 year old girl. Men are aware of pubescent girls, and vulgar men comment on or even to them. If the vulgar man then has sex with such a girl, someone who knew of the comment could not be thought to have overlooked an obvious danger to her. The Town's officials had in fact no reason to believe that Waymire was molesting or was going to molest any teenage girl, and so the Town cannot be held liable under section 1983. 114 F.3d at 651-52 (emphasis added) (citations omitted).

Finally, West suggests that this Court grant certiorari for the purpose of applying a reasonable foreseeability test in determining whether an obvious risk existed that an untrained and unsupervised Brad Waymire might molest her. West's reasonable foreseeability suggestion smacks of a negligence standard, a standard which has been repeatedly rejected by this Court in discussing municipal liability under §1983. Anything is foreseeable. Under West's formulation, if any possibility exists that an officer might engage in unconstitutional conduct, the municipality should be held liable under §1983. Without doubt, this is not the law as articulated by this Court in Monell, Canton,

and Brown. Other than to suggest that adoption of this standard would ensure full compensation of a victim, West articulates no public policy reasons for such a dramatic change in the law. Indeed, the new standard proposed by West would impose §1983 liability against governmental officials without proof of any actual wrongdoing on their part. Section 1983 was never so intended.

CONCLUSION

The Seventh Circuit Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any new questions of law. Municipal liability under §1983 should be the exception to the rule; not the rule. To hold that the sparse evidence presented by West satisfies the stringent standards articulated in Monell, Canton, and Brown would signal a return to concepts of respondeat superior under §1983. There is no reason to disturb the Seventh Circuit's well-reasoned opinion and the Petition should be denied.

Respectfully submitted,

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